

**CENTER
FOR CONSTITUTIONAL JURISPRUDENCE**

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November 14, 2008

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Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

CLERK SUPREME COURT

Re: Amicus curiae letter of the Center for Constitutional Jurisprudence in opposition to the original proceeding petitions challenging Article 1, §7.5 of the California Constitution (Proposition 8), *Strauss v. Horton*, S168047; *Tyler v. State of California*, S168066; *City and County of San Francisco v. Horton*, S168078

Pursuant to California Rules of Court, Rule 8.500(g)(1), the Center for Constitutional Jurisprudence submits this amicus curiae letter to urge the California Supreme Court to deny summarily the original proceeding petitions filed against Article 1, §7.5 of the state Constitution (Proposition 8) on the merits.

The amicus curiae, the Center for Constitutional Jurisprudence, is an educational, litigation and advocacy program in constitutional law and jurisprudence located at Chapman University School of Law. Founded in 1999 as the public interest litigation arm of The Claremont Institute for the Study of Statesmanship and Political Philosophy, the Center provides legal representation and litigation support through the work of students and attorneys in cases of constitutional significance, advancing through its strategic litigation its mission of restoring the principles of the American Founding to their rightful and preeminent authority in our national life.

Denial of these petitions on their merits would advance the rights of the people to self government and restore public confidence in the integrity of the state judiciary.

1. California jurisprudential principles and precedents plainly state that when any two provisions of the state Constitution cannot be reconciled, then the latest in time prevails. Proposition 8 has added language to the state Constitution, Article 1, §7.5, that overturned the state Supreme Court interpretation of another provision of the state Constitution, the Article 1, §7 equal protection clause, in the *Marriage Cases* (2008) 43 Cal.4th 757. If the two clauses cannot be reconciled, then the language of the more recently adopted provision, Article 1, §7.5 (Proposition 8), controls. *People v. Adamson* (1946) 27 Cal.2d 478, 486-487.

2. The California Supreme Court has no lawful authority to remove Article 1, §7.5 (Proposition 8) from the state Constitution. The justices of the Supreme Court derive their powers only from the state Constitution itself (Article 6). The four justices who acted to invalidate the state statutory definition of marriage under the authority of their reading of the equal protection clause of the state Constitution in the *Marriage Cases* no longer have any constitutional justification for such a holding because Article 1, §7.5 is now part of the Constitution and binding on the Supreme Court. To the extent that the state Constitution acts as a restraint on the powers of the government, its restraints apply equally to the state judiciary and the Supreme Court. As this Court stated in the majority opinion in the *Marriage Cases*, "the provisions of the California Constitution itself constitute the ultimate expression of the people's will." 43 Cal.4th at 852.

3. The petitions urge a political and ideological argument that the Supreme Court justices hold extra-constitutional powers to declare Article 1, §7.5 (Proposition 8) to be an unconstitutional revision of the state Constitution under Article 18. This contention violates clear judicial precedents and is a disguised plea for blatant judicial activism. It is an affront to the right of the people of California to constitutional self government. The justices of the California Supreme Court are being pressed to impose personal views of public policy by judicial fiat, an improper role that threatens the integrity of the entire judicial system and the foundational principles of constitutional government.

Article 1, §7.5 is not a prohibited "revision" of the state Constitution by initiative within the meaning of Article 18. Article 1, §7.5 simply restored California law to what it has been throughout state history except for the brief period between the decision in the *Marriage Cases* on May 15, 2008 and the enactment of Article 1, §7.5 on November 4. To label that a major change in the structure of the state government borders on frivolous. If the legislative act of the people of the state of California adding the definition of marriage to the state Constitution were to represent a revision of the state Constitution, then the decision of the 4-3 majority of the state Supreme Court in the *Marriage Cases* itself was an unconstitutional revision of the state Constitution and an *ultra vires*, extra-judicial act.

The specter of wresting self-government from the people of the state was a dire and unconstitutional consequence recognized by the California Supreme Court in rejecting the revision argument in *People v. Frierson* (1979) 25 Cal.3d 142. In *Frierson* the state Supreme Court upheld the adoption by initiative of Article 1, §27 of the California Constitution, which restored the death penalty and abrogated the decision of the California Supreme Court in *People v. Anderson* (1972) 6 Cal.3d 628. Previously the Court had interpreted Article 1, §17 (then §6), which prohibits cruel and unusual punishment, to ban the death penalty. The parallel between the death penalty initiative in 1972 and the marriage amendment in 2008 is unmistakable. Both were initiatives adopted by the people just months after a state Supreme Court decision interpreting an existing provision of the state Constitution to declare new constitutional rights to which the people objected. Both initiatives added new articles to the state constitution, leaving unchanged the original articles upon which the state Supreme Court's previous decision

relied, and each of the new articles specified clearly, precisely and narrowly what the state constitution means and how it is to be interpreted and applied, then to the death penalty and now to marriage.

Addressing the revision issue, the Supreme Court in *Frierson* stated that although it had held in *Anderson* that the death penalty is "unnecessary to any legitimate goal of the state and incompatible with the dignity of man and the judicial process" (6 Cal.3d at 656), nevertheless, the initiative that added Article 1, §27 to the Constitution and reversed the holding in *Anderson* was not an unconstitutional revision. "The clear intent of the electorate in adopting section 27 was to circumvent *Anderson* by restoring the death penalty," the Court noted in *Frierson*. "The decisions of the people in 1972 and 1978 and of the Legislature in 1977 may or may not have been wise, but we think there can be no reasonable doubt as to their intention or purpose. [¶] We conclude that, properly construed, section 27 validates the death penalty as a permissible type of punishment under the California Constitution." *Frierson*, 25 Cal.3d at 184. Then the Supreme Court added its warning against disenfranchising the people of the state:

Furthermore, in *Amador Valley*, we cautioned that too strict a construction of the revision rule "would in effect bar the people from ever achieving any local tax relief through the initiative process." ***Similarly, the adoption of defendant's position might effectively bar the people from ever directly reinstating the death penalty, despite the apparent belief of a very substantial majority of our citizens in the necessity and appropriateness of the ultimate punishment.*** Applying a reasonable interpretation, we conclude that article I, section 27, fairly may be deemed a constitutional amendment, ***not a revision***.

Frierson, 25 Cal.3d at 187; citation omitted; emphasis added.

The initiative approved in *Frierson* amended the state Constitution to reverse the decision of the state Supreme Court condemning the death penalty and stripped the Supreme Court of its prior authority to ban taking a criminal defendant's life by judicial process. This life-or-death initiative was recognized as a constitutional amendment, not a revision. It would be rationally unjustifiable to treat the enactment by initiative of Article 1, §7.5 (Proposition 8) as a revision of the state Constitution in violation of Article 18, when it does not take away a person's life but simply restores the pre-existing definition of marriage and leaves untouched the option of domestic partnerships.

The other state Supreme Court cases finding initiatives to be amendments rather than revisions lead to the same conclusion.

4. The principal argument in the petitions, that Proposition 8 is illegal, is preempted by federal law, the Defense of Marriage Act (DOMA), 28 U.S.C. §1738C. DOMA authorizes states to enact laws that exclude recognition of same sex marriages performed in other states, which Article 1, §7.5 (Proposition 8) does: "Only marriage

between a man and a woman is *valid or recognized in California*" (emphasis added). The petitioners' argument that enactment of a state constitutional provision that denies legal recognition to same sex marriages is itself illegal (because it disagrees with the Court's prior interpretation of the state equal protection clause and therefore constitutes a revision of the Constitution) disregards the existence of the federal DOMA law which expressly authorizes states to enact such laws. These petitions thus raise federal preemption and federal due process claims, and portend removal of these issues from the California Supreme Court into the federal courts. A state constitutional amendment cannot be held to be unconstitutional for violation of judicially created civil rights when federal law explicitly authorizes states to adopt such a constitutional provision.

5. A decision by the state judiciary or the state Supreme Court mischaracterizing Proposition 8 as an unconstitutional "revision" in order to permit the state Supreme Court to exercise unreviewable and uncorrectable law-making authority over the people of the state would be a denial of a sacred trust and judicial oaths, a transgression of state and federal constitutional principles of electoral due process, substantive due process of law and the rights of the people to self-government, and a violation of the republican guarantee clause of the U.S. Constitution. See, e.g., *Bouie v. City of Columbia, South Carolina* (1964) 378 U.S. 347, 361-62, holding that state courts do not have a free hand to interpret state law beyond what a "fair reading" would permit, without violating due process; *New York v. United States* (1992) 505 U.S. 144, 186, attempts by state governmental officials to alter "the form or the method of functioning" of the state government might give rise to a justiciable Republican Guarantee Clause challenge. Such an action by the Supreme Court would create an uncontrollably dangerous precedent that in other times and circumstances could be used to threaten or destroy the very rights and interests that the opponents of Proposition 8 are trying to advance by the petitions filed in this proceeding.

Unlike the plaintiffs in Colorado in *Romer v. Evans* (1996) 517 U.S. 620, the proponents of same sex marriage in California are not left without recourse. Like other cultural movements before them, they can continue their efforts to turn public opinion in their favor, which has gone their way dramatically over the last decade, and then propose another constitutional amendment by initiative to approve same sex marriage.

"[The] power of initiative must be liberally construed. . . . [I]t is our solemn duty jealously to guard the sovereign people's initiative power, it being one of the most precious rights of our democratic process." *Brosnahan v. Brown* (1982) 32 Cal.3d 236, 241.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

I am over the age of 18 and not a party to this action. I am a resident of or employed in the county where the document(s) described below were mailed. My business address is 5530 Birdcage Street, Suite 210, Citrus Heights, California 95610. I served the document(s) described below on the interested parties in this action by placing a true and correct copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail:

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Description of document(s): Amicus curiae letter of the Center for Constitutional Jurisprudence in opposition to the original proceeding petitions challenging Article 1, §7.5 of the California Constitution (Proposition 8), Strauss v. Horton, S168047; Tyler v. State of California, S168066; City and County of San Francisco v. Horton, S168078

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I declare under penalty of perjury that the foregoing is true and correct. Executed at Citrus Heights, California, November 14, 2008.
